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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, In his official capacity as Attorney General,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE OF THE BUREAU OF NATIONAL AFFAIRS, INC.; CCH INCORPORATED; HOUGHTON MIFFLIN COMPANY, INC.; THE MCGRAW-HILL COMPANIES; REED ELSEVIER INC.; AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE PETITION DOES NOT PRESENT A JUSTICIABLE CONTROVERSY	5
A. The Attorney General Is Not A Proper Defendant In The Absence Of A Credible Threat of Federal Criminal Prosecution	7
B. Petitioners Present A Hypothetical And Abstract, Rather Than A Ripe, Concrete Controversy	10
II. THE CTEA IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE COPYRIGHT CLAUSE	14
A. Petitioners' Argument is Inconsistent With the History of the Copyright Clause and Asserts an Unduly Narrow View of How Congress May Promote Progress	15

TABLE OF CONTENTS—Continued

Page

1. Throughout Most Of The History Of Federal Copyright Law, That Law Provided Protection Upon Publication And Dissemination, Not Upon Creation 15

2. The First Congress Clearly Understood That Its Power Under The Copyright Clause Extended Beyond Providing Incentives For The Creation Of New Work; Later Congresses Have Followed Suit 17

3. Throughout History, Congress Has Frequently Enacted Copyright Laws That Cannot Be Explained As Designed Only To Provide Incentives For The Creation Of New Works 19

(a) Applying New Rights To Existing Works 19

(b) Other Examples 21

TABLE OF CONTENTS—Continued

Page

B. Freed Of Petitioners' Crabbed Interpretation Of Congress's Power, The CTEA Easily Passes Constitutional Muster 22

III. APPLICATION OF THE CTEA'S COPYRIGHT EXTENSION TO EXISTING COPYRIGHTS DOES NOT VIOLATE THE FIRST AMENDMENT 26

A. Mechanical Reproductive Copying of Another's Copyrighted Work Without Permission Is Probably Not Free Expression For Purposes of the First Amendment 27

B. Application of the CTEA's Copyright Term to Existing Copyrights Satisfies Intermediate Scrutiny 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

	Page
Author's League of America v. Oman, 790 F.2d 220 (2nd Cir. 1986)	28
Boyle v. Landry, 401 U.S. 77, 80-81 (1971)	7
Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1883)	18
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)	21
Coleman v. Miller, 307 U.S. 433 (1939)	6
Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001)	5, 14, 26
Feist Pubs. v. Rural Telephone, 499 U.S. 311 (1991)	11
Golden v. Zwicker, 394 U.S. 103 (1969)	7
Harper & Row v. The Nation, 471 U.S. 539 (1986)	12, 27
Ins. Corp. of Ireland Ltd. v. Companie des Banxites de Guinee, 456 U.S. 694 (1982)	6
Kewanee Oil v. Bicron Corp., 416 U.S. 470 (1974)	16
Ladd v. Law & Technology Press, 762 F.2d 809 (9th Cir. 1985)	22
Lynch v. Donnelly, 465 U.S. 668 (1983)	18
Martin v. City of Indianapolis, 982 F. Supp. 625 (S.D. Ind. 1997)	19
O'Shea v. Littleton, 414 U.S. 488 (1974)	7
Sony v. Universal Studios, 464 U.S. 417 (1984)	13

TABLE OF AUTHORITIES—Continued

	Page
United Christian Scientists v. Christian Science Bd. of Directors, 829 F.2d 1152 (D.C. Cir. 1987)	26
United Public Workers of America v. Mitchell, 330 U.S. 75 (1947)	5
United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir 1989)	27
Valley Forge v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)	5

STATUTES

Act of Feb. 3, 1831, 4 Stat. 436	11, 16
Act of July 8, 1870, 16 Stat. 212	16
Act of March 4, 1909, 35 Stat. 1075	11, 12, 15, 16
Act of May 31, 1790, 1 Stat. 124	4, 11, 17
Pub. L. No. 98-450, 98 Stat. 1727 (1984)	20
Pub. L. No. 100-568, 102 Stat. 2853	23
Pub. L. No. 101-650, 104 Stat. 5089 (1990)	19, 21
Pub. L. No. 102-307, 106 Stat. 274 (1992)	22
Pub. L. No. 104-39, 109 Stat. 336 (1995)	20
Pub. L. No. 105-298, 112 Stat. 2827 (1998)	3
Pub. L. No. 106-160, 113 Stat. 1774 (1999)	20
17 U.S.C. § 101	11
17 U.S.C. § 102(a)	11
17 U.S.C. § 106A(d)(2)	19
17 U.S.C. § 110(3)	12
17 U.S.C. § 111	21

TABLE OF AUTHORITIES—Continued

	Page
17 U.S.C. § 202	22
17 U.S.C. § 301(a)	19
17 U.S.C. § 301(c)	11
17 U.S.C. § 701	22
18 U.S.C. § 1030	28
18 U.S.C. § 1832(a)(2)	28
28 U.S.C. § 2403(a)	7
LEGISLATIVE MATERIALS	
H.R. Rep. No. 94-1476 (1976)	22, 23
S. Rep. No. 98-162 (1984)	20
7 Reg. Deb. 21, Cong. 2d Sess. App. CXIX (Dec. 17, 1830)	23
7 Reg. Deb. 424 (statement of Mr. Huntington) (Jan. 7, 1831)	25
MISCELLANEOUS	
Department of Justice, Computer Crime and Intellectual Property Division, http://www.cybercrime.gov/ipcases.html (visited June 21, 2002)	9
Edward Samuels, The Public Domain in Copyright Law, 41 J. Copyright Soc'y U.S.A. 137, 172-73 (1993)	19
Gorman and Ginsburg, Copyright 347 (2002)	16
M. Nimmer & D. Nimmer, Nimmer on Copyright, § 5.04	17, 18
Supplemental Report of the Register of Copyright on the General Revision of U.S. Copyright Law, 87-88 (1965)	23
Wright and Miller, Federal Practice and Procedure, § 2761	9

INTEREST OF AMICI[1]

Amici are five corporations—The Bureau of National Affairs, Inc., CCH Incorporated ("CCH"), Houghton Mifflin Company, Inc., The McGraw-Hill Companies, Reed Elsevier Inc.—and one trade association, the Software & Information Industry Association ("SIIA").

The Bureau of National Affairs, Inc. is a prominent publisher of print and electronic news, analysis, and reference products, providing intensive coverage of legal and regulatory developments.

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[1] No entity or counsel apart from those whose names appear on this brief have contributed monetarily or substantively to its production, and consent to its filing has been lodged with the Clerk of the Court.

The McGraw-Hill Companies is a global information provider focusing on financial services, education and business information. It includes Standard & Poor's, a worldwide provider of information regarding credit ratings, investments, and corporate valuations, McGraw-Hill Education, the largest kindergarten through 12th grade publisher in the U.S. and a leading global provider of education materials, and Business Week magazine.

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The Software & Information Industry Association ("SIIA") is the leading trade association committed to promoting and protecting the interests of the software and information industries. SIIA represents over 800 member companies, including prominent publishers of software and information products for reference, education, business, consumer, the Internet and entertainment uses.

Each of these corporations and SIIA's members create and distribute original works of authorship. Their ability to do so is directly affected by the operation of the United States copyright system. Events since the passage of the

Copyright Revision Act of 1976 make it critical that Congress retain the constitutional authority to amend the law in response to technological and international developments.

Amici file this brief in support of respondent Attorney General because of the implications of petitioners' arguments for the functioning of the U.S. copyright system. Petitioners assert limits on Congress's authority under the Copyright Clause that, if adopted, would significantly curtail the ability of Congress to enact effective copyright legislation in the future; those arguments also cast doubt upon many past exercises of the copyright power that *amici* rely on to protect their intellectual property.

SUMMARY OF ARGUMENT

The complaint in this case appears not to present a justiciable controversy. Petitioners base their standing to sue the Attorney General on their alleged fear of criminal prosecution if they reproduce works originally published in the 1920s that have remained in copyright because of the 1998 Copyright Term Extension Act ("CTEA").[2] Petitioners, however, do not allege that they have actually infringed any 1920s copyrights, nor do they allege that there are specific, named works they wish to reproduce, that those works are, in fact, still in copyright, and that petitioners have been unable to secure permission to publish from the copyright owners. Petitioners have not been threatened with either prosecution or civil suit. And, even if one of the petitioners were to infringe an existing copyright at some time in the future, the possibility of a federal prosecution for activities of the type in which they engage is, at best, extremely remote. In these circumstances, petitioners' wholly subjective "fear of prosecution" for actions they have

[2] Pub. L. No. 105-298, 112 Stat. 2827 (1998).

not taken does not establish justiciability. Their failure to specify the actions they wish to take also deprives the case of the concreteness that Article III requires.

On the merits, petitioners base their position on an extraordinarily narrow and incorrect view of Congress's power under the Copyright Clause. According to petitioners, the *only* purpose that can support a copyright law—*i.e.*, the *only* way that such a law can be said to "Promote the Progress" of literature and art—is for it to provide incentives for authors to create new works. According to that view, the new term of copyright provided by the CTEA cannot be applied to works created before enactment of the CTEA because "a term granted to a work already in existence, does not promote Science." Pet. Br. 10.

This oddly wooden limitation is completely inconsistent with the theory and history of U.S. copyright laws. It fails to take into account that the first U.S. Copyright Act[3] accorded statutory copyright to works already in existence, that every term extension since 1790 has applied to works already in existence, and that other new benefits of copyright, such as increased penalties for infringement and new exclusive rights for copyright owners, have also commonly (and common-sensically) been made available to the proprietors of existing copyrights, as well as to authors of future works. Petitioners' crabbed limitation on Congress's power would not only invalidate a wide array of copyright laws enacted by Congress in the past, it would also hamstring the ability of Congress to enact future copyright statutes to deal with threats to the rights in existing works.

Finally, petitioners' invocation of the First Amendment turns on their assumption that the "freedom of speech"

[3] Act of May 31, 1790, 1 Stat. 124.

protected by that Amendment includes the right to mechanically reproduce and distribute the copyrighted works of others without their permission, and even against their expressed wishes. *Amici* doubt the validity of that premise. But even if copyright infringement is to be considered as constituting First Amendment activity, Congress's enactment of a valid, content neutral copyright law pursuant to an explicit Article I power merely constitutes action supported by important governmental interests. And inclusion of a broad fair use provision in that law, coupled with the doctrine that copyright protects only an author's particular means of expression—not the ideas set forth through that expression—amply satisfies any narrow tailoring requirement.

ARGUMENT

I. THE PETITION DOES NOT PRESENT A JUSTICIABLE CONTROVERSY

Although justiciability was not questioned below,[4] *amici* believe that the complaint in this case does not present a justiciable controversy. This Court has repeatedly emphasized that constitutional issues may be resolved by federal courts only when those issues arise between real adversaries in a concrete factual context.[5] The present proceeding does not remotely meet that standard.[6]

[4] In the court of appeals, respondent questioned petitioners' standing to claim that the First Amendment is violated by the application of the CTEA to works "yet to be created." *See Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001). Petitioners no longer challenge the constitutionality of the CTEA's prospective application. *See* Pet. Br. 48.

[5] *See, e.g.*, *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947) ("For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field.") (internal citation omitted); *Valley Forge v. Americans United for Separation of Church*

Petitioners and their *amici* have a strong philosophical disagreement with Congress's 1998 decision to extend the term of U.S. copyright by 20 years. They seek to bring that policy dispute to this Court by basing a constitutional claim on their allegation that "certain of the plaintiffs were preparing to use in some way" works that would have fallen out of copyright[7] but for enactment of the CTEA, and that these unspecified petitioners have a "fear of prosecution" if they do so. Pl.'s 2d Amd. Compl. ¶14. Petitioners have not, however, named the works certain of them wish to use, stated the way in which those petitioners wish to use those works, alleged that the works are still, in fact, in copyright or alleged that the use petitioners wish to make of the works would actually be prohibited by the Copyright Act. Nor do petitioners allege that they cannot obtain permission from copyright owners to use the works. Petitioners indeed have not even included as defendants, much less identified, the

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and State, 454 U.S. 464, 472 (1982) (Legal questions must be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J. dissenting) ("[C]ourts will not pass upon . . . abstract, intellectual problems, but adjudicate concrete living contest[s] between adversaries.") (internal quotation omitted).

[6] A defect in subject-matter jurisdiction is, of course, not waivable by the parties and may be raised at any time, including by the Court on its own motion. *See, e.g., Ins. Corp. of Ireland Ltd. v. Companie des Banxites de Guinee*, 456 U.S. 694, 702 (1982).

[7] The CTEA added a twenty-year extension to the term of subsisting copyrights. A work published in 1923 would have initially been entitled to two 28-year terms of copyright if the author complied with applicable statutory formalities, terms that would have ended in 1979. When Congress passed the comprehensive 1976 revision of the Copyright Act, it extended the term of subsisting copyrights so that copyrights in their second 28-year term would have a term of 75 years from the date of publication. Thus, works published in 1923 would have fallen out of copyright at the end of 1998, the year in which petitioners' complaint was filed, but for the enactment of the CTEA in October of that year.

owners of the copyrights in the works in which they supposedly are interested. They seek relief only against the Attorney General, who has no civil copyright enforcement authority and who has never threatened criminal enforcement against petitioners or allegedly prosecuted anyone for activities similar to those in which they purportedly wish to engage. Petitioners thus present an unripe, academic and completely hypothetical controversy against a nonadversarial party defendant. Such a "case" is not justiciable.

A. The Attorney General Is Not A Proper Defendant In The Absence Of A Credible Threat of Federal Criminal Prosecution

The federal Copyright Act creates private rights that are almost entirely privately enforced. The United States does not civilly enforce the rights of copyright owners, nor does it claim copyright in its own works. The Attorney General is thus not an adverse party[8] in this case unless petitioners are under a real and immediate threat of criminal prosecution by the United States.[9] Petitioners allege no such threat and, in fact, none exists.

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[8] The Attorney General must, however, be given notice of federal court challenges to the constitutionality of an Act of Congress affecting the public interest, and may intervene if he so wishes. 28 U.S.C. § 2403(a). This intervention authority applies only when a justiciable controversy against an actual adversarial defendant exists; it plainly does not authorize suit to be brought against the Attorney General simply because plaintiff wishes to challenge the constitutionality of a federal statute.

[9] *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 491, 493 (1974) (complaint seeking declaration against officials based on discriminatory prosecution practices dismissed because no plaintiff was facing prosecution); *Boyle v. Landry*, 401 U.S. 77, 80-81 (1971) (dismissing declaratory judgment action against criminal intimidation statute because no plaintiff had actually been charged under the statute); *Golden v. Zwicker*, 394 U.S. 103, 109 (1969) (First Amendment challenge to statute

Petitioners collectively allege that they have a "fear of prosecution by Defendant [Ashcroft] for violations of the NET Act." Pl.'s 2d Amd. Compl. ¶ 16. No basis for this wholly subjective fear is set forth in the complaint. No petitioner alleges, for example, that he, she or it has ever been investigated, prosecuted or in any way threatened with federal prosecution for copyright infringement. No petitioner even alleges that they have been the subject of any past (or threatened future) *civil* copyright infringement action. The complaint contains no allegation that any person, entity or company that conducts activities similar to those conducted by any of the petitioners has ever been subjected to (or even investigated for or threatened with) a criminal prosecution.[10]

In these circumstances, there is simply no existing threat that any petitioner faces or would face imminent criminal prosecution by the United States even if one or more of the petitioners should, at some time in the future, violate a then-existing copyright. It is important to bear in mind that the occurrence of an act of copyright infringement does not inevitably, usually, or even ordinarily lead to a federal criminal prosecution. Federal prosecutions for copyright infringement are, in fact, extraordinarily rare. *Amici* could, for example, find no criminal case under the 1976 Copyright Act—reported or otherwise—in which the basis for prosecution was the reproduction of books or sheet music,

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prohibiting distribution of anonymous election literature non-justiciable because the prospect of prosecution was neither "real nor immediate").

[10] Even were an infringement of a 1923 work to occur, the $1,000.00—within 180 days—threshold for NET prosecution would rarely be met. The described activities of some of the petitioners actually appear to make them legally *immune* from prosecution. Most of the petitioners appear to specialize in out-of-print works and works of extremely limited general interest and valuing the damage caused by the infringement of an out-of-print work is extremely difficult.

much less a criminal case based on the distribution of sheet music or books that were in the last twenty years of their copyright term.[11] The dearth of reported cases is confirmed by *amicus'* practical experience. *Amicus* SIIA has an extensive antipiracy program, through which it enforces copyrights on behalf of its members. In SIIA's experience, even in those instances when hundreds of thousands of dollars are involved, it is *extremely* difficult to convince federal prosecutors to bring cases involving infringements of works released last year, much less seventy years ago. In light of the routine appearance of pirated software, music, and motion pictures on the Internet before or within days of their public release, it strains credulity to believe that the Justice Department would make prosecuting infringement of works published in 1923 a law enforcement priority.[12]

Moreover, not only have petitioners sued a party (the Attorney General) with whom they have no justiciable dispute, they have failed to sue any of the only parties with whom they *might* have such a dispute—the owners of copyrights of works they supposedly wish to reproduce.

Petitioners' failure to include or identify any of the copyright owners whose rights are involved is more than a technical omission. Copyright owners may have important information and highly relevant perspectives to contribute to judicial consideration of the constitutionality of the

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[11] *See, e.g., Department of Justice, Computer Crime and Intellectual Property Division*, http://www.cybercrime.gov/ipcases.html (visited June 21, 2002) (listing representative criminal intellectual property cases in the last three years). The problem of seventy-year old works reproduced on the Internet is not a law enforcement (or even in some cases a copyright owner's) priority.

[12] If a petitioner sought to bring an action for declaratory judgment against a copyright owner, the failure to allege an existing threat of suit for infringement would defeat federal jurisdiction. *See generally* Wright and Miller, Federal Practice and Procedure, § 2761.

application of the CTEA to 1923 works. Petitioners' principal argument on the merits is that Congress had no rational basis for believing that the extension of the 1923 term of copyrights would contribute to the progress of literature, art, and music. The owners of those copyrights—those whom Congress intended to benefit from the extended term—are uniquely situated to provide information about the ways in which an extended term for their works may encourage distribution, preservation or creation of works of literature or art, or otherwise further the many proper objectives of copyright law. Their conspicuous absence deprives this case of the concreteness necessary to render it justiciable.

B. Petitioners Present A Hypothetical And Abstract, Rather Than A Ripe, Concrete Controversy

Petitioners base their standing to sue on their alleged desire to copy, reprint, perform, restore, or sell 1923 works. Pl.'s 2d Amd. Comp. ¶¶ 14, 16. As indicated above, however, petitioners completely fail to specify *which* of those works they wish to use, or to describe *how* they wish to use those works. They allege instead that "*certain of the Plaintiffs* were preparing *in some way*" (emphasis added) to use some such works—primarily those that are out-of-print and of little current commercial value.

By failing to provide specific information about which works they seek to use and how they seek to use them, petitioners have made it impossible to know whether there is a ripe controversy—whether the works they might wish to use are, in fact, presently subject to federal statutory copyright; whether, even if the works are in copyright, petitioners' proposed uses would be prohibited by the Copyright Act; and whether, if petitioners' uses *would*

constitute copyright infringement, those uses might nevertheless be authorized or permitted by the copyright owner, if authorization were to be requested.

Petitioners' failures may be based on an assumption that *any* work created in 1923 would, of necessity, have had its copyright extended by the CTEA, and that any use of any such work by a petitioner would necessarily constitute an act of copyright infringement. Such an assumption would be entirely incorrect.

- *First*, the fact that a work may have been created in 1923 does not mean that the copyright term would have started to run in that year or even within the next several years. In 1923—and indeed for the whole history of the U.S. statutory copyright law between 1790 and 1978—federal copyright protection typically began at the time of *publication* of a work, not at the moment of its creation.[13]

- *Second*, not all works published in 1923 are the subject of statutory copyright protection. Such a work, for example, might fail to meet the constitutionally required standard of originality, see 17 U.S.C. § 101; *Feist Pubs. v. Rural Telephone*, 499 U.S. 311 (1991), or might be a work, such as a sound recording, that was not the subject of federal copyright at that time.[14]

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[13] *See, e.g.*, Act of March 4, 1909, § 10, 35 Stat. 1075 (1909); Act of Feb. 3, 1831, § 5, 4 Stat. 436 (1831); Act of May 31, 1790 § 3, Stat. 124 (1790). Even under current law, a work is not "created" until it is fixed in tangible form. 17 U.S.C. § 102(a).

[14] *See* 17 U.S.C. § 301(c) (pre-1972 sound recordings subject to state common law protection).

- *Third*, many works first published in 1923 may not be under copyright protection, failure to comply because of the formalities that were required in order to obtain and keep statutory copyright. Under the 1909 Act, an author or his or her assignee would irrevocably lose statutory protection if the work were published without a proper notice of copyright.[15] Moreover, if the copyright proprietor did not comply with the complex renewal provisions, the copyright was forfeited at the end of its initial 28-year term.[16]

- *Fourth*, even if copyright were properly obtained and renewed for a 1923 work, the desired use of that work by one of the petitioners may well not be proscribed by today's copyright statute. Petitioner Jill Crandall, for example, alleges that she has been prevented from "freely copying [unspecified musical] works that were copyrighted in 1923" that she wishes to perform with the church choir that she directs. Pl.'s 2d Amd. Compl. ¶¶ 36-38. Even if these works have survived the copyright formalities, their performance at church services is exempted from the exclusive rights that currently belong to a copyright owner. 17 U.S.C. § 110(3). And copying the scores of those works for purposes of a church performance, may—depending upon the size of her choir, whether the scores are out of print,[17] what is done with the

[15] Act of March 4, 1909, § 10.

[16] The initial term of copyright in 1923 was 28 years, with an additional 28-year term potentially available to the copyright owner, but only if an eligible person applied for renewal in the proper form and within the strictly limited window of time provided for that purpose. If renewal were not properly applied for and obtained, copyright would terminate at the end of the initial 28-year term. *See* Act of March 4, 1909, § 24.

[17] *See Harper & Row v. The Nation*, 471 U.S. 539, 553 (1986) (observing that "a key, though not necessarily determinative, factor in

scores after the choir performance, and other factors too numerous to describe[18]—might well constitute fair use of the material, thus providing a complete defense to an infringement action.

- *Finally*, in order to violate the federal copyright statute, a defendant must make the work available *without the consent of the copyright owner*. Having failed to specify the works they wish to use, petitioners obviously cannot (and do not) allege that they have sought permission from any copyright owner to republish any work, or that they have been unable to obtain permission.

In sum, petitioners allegations show, at most: (1) that some works created in 1923 are presently subject to copyright; (2) that some petitioners might at some time wish to use one or more or these works; (3) that such uses might possibly be prohibited by the Copyright Act; (4) that the owners of the copyright might possibly not authorize petitioners' uses; and (5) that one or more petitioners therefore might someday possibly be threatened with federal criminal prosecution. A case based on that chain of hypothetical possibilities is not an appropriate context for judicial resolution of the constitutionality of an important federal statute.

fair use is whether or not the work is available to the potential user," and that "If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it"). The nonprofit use of out-of-print material by other petitioners may also constitute fair use.

[18] Fair use is copyright's equitable rule of reason that balances a variety of interests in determining whether infringement is excused in a particular case. *See Sony v. Universal Studios*, 464 U.S. 417, 448 n.31 (1984) (noting the case-by-case nature of fair use).

II. THE CTEA IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE COPYRIGHT CLAUSE

Petitioners argue that the "retroactive" application of the CTEA's new term of copyright to works that existed at the time of the CTEA's enactment is unconstitutional. Pet. Br. 17-31. They base their argument on their assertion that the single permissible purpose that can justify a copyright law—*i.e.*, the only way that such a law can "Promote the Progress" of literature, music and art—is for it to stimulate authors to create new works.[19] Since extension of the term of copyright for a work already in existence cannot serve as an incentive for the production of that work, petitioners argue, such an extension cannot be a valid federal copyright law.[20]

This is an odd and artificially straitjacketed view of what Congress can do to "promote the Progress of Science and useful Arts."[21] It is inconsistent with the theory and history

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[19] *See* Br. or Petitioner at 22-23 (To promote the "Progress of Science," a copyright term must, "stimulate . . 'the creative activity of authors.' . . . Whatever else a [copyright law] may do, it must promote 'creative activity' to satisfy the limits of the Constitution.").

[20] *See* Pet. Br. 22 ("It follows that a blanket extension of existing copyrights cannot be a 'limited Time []' that 'promotes the Progress of Science.' It cannot, because the incentive is being given for work that has already been produced. Retroactive extensions cannot 'promote' the past. No matter what we offer Hawthorne or Hemingway or Gershwin, they will not produce anything more.").

Petitioners similarly argue that extending the copyright term of existing works violates what they call the "Quid Pro Quo Requirement" of the copyright clause. Pet. Br. 23 ("[Congress's] Copyright Clause power is contingent upon an exchange. As nothing is received by the public in exchange for, or conditioned upon, the retroactive extension [of copyright to existing works] CTEA is beyond Congress's power.").

[21] *Amici* agree with the court of appeals that the introductory language of the Copyright Clause is not a judicially enforceable limitation on Congress's powers under that Clause. *See Eldred v. Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001). Because *amici* understand that

of U.S. copyright laws and it fails utterly to appreciate that progress in art, literature and music and knowledge in society can be promoted in a variety of ways in addition to the direct stimulation of the creation of new works. The reasons given by Congress for enactment of the CTEA, such as encouraging dissemination, increased life expectancy of authors and their heirs, and international harmonization are more than sufficient for the exercise of its Article I power, and are consistent with the historical exercise of that power over the last 200 years. If adopted, petitioners' contention would handcuff Congress in addressing important copyright problems in the future, and it would, in addition, render unconstitutional all or part of virtually every copyright statute that Congress has ever enacted.

A. Petitioners' Argument is Inconsistent With the History of the Copyright Clause, and Takes an Unduly Narrow View of How Congress May Promote Progress

1. Throughout most of the history of federal copyright law, that law provided protection upon publication and dissemination, not upon creation.

For almost two hundred years, with minor exceptions, federal copyright protection did not attach upon creation of a work, but only when the work was published with the necessary formalities—*i.e.*, when copies of the work were distributed to the public with notice of copyright.[22] During

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respondent and other amici will address this point in detail, we focus our comments on petitioners' incorrect interpretation of the constitutional language.

[22] See, *e.g.*, Act of March 4, 1909, § 10 ("Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title."). Under § 12

the time period between a work's creation and its publication, copyright protection was the exclusive province of state law.[23] Thus, for most of its history, federal copyright law directly provided incentives to the process of *dissemination*, not creation.[24] It was not until January 1, 1978, the effective date of the Copyright Revision Act of 1976, that federal copyright protection attached at the time of a work's creation and fixation in tangible form.

Clearly, the Congress that enacted the first federal copyright law in 1790, and the Congresses that enacted the major copyright revision laws in 1831,[25] 1870[26] and 1909[27] were primarily concerned with enacting laws pursuant to the Copyright Clause to promote publication and distribution of existing works—something petitioners now tell us is an inadequate constitutional basis for a copyright law.[28] Moreover, even in making the fundamental shift from a publication-oriented copyright law to one that initiates protection upon fixation of original works of authorship, the 94th Congress continued to show its concern with encouraging dissemination. Section 303(a) of the 1976 Copyright Act revision terminated state protection for existing unpublished works, substituting federal statutory protection until December 31, 2002. But if the work were

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of the 1909 Act, statutory copyright protection was available for certain unpublished works, such as lectures and photographs, that were typically publicly exploited by being performed or exhibited without the distribution of copies to the public.

[23] Under § 2 of the 1909 Copyright Act, there was no federal pre-emption of state protection for unpublished works.

[24] See Gorman and Ginsburg, Copyright 347 (2002).

[25] Act of Feb. 3, 1831, 4 Stat. 436.

[26] Act of July 8, 1870, 16 Stat. 212.

[27] Act of March 4, 1909, 35 Stat. 1075.

[28] Patent law similarly has always focused its protection on the act of making an invention available to the public, not on the act of invention itself. *See Kewanee Oil v. Bicron Corp.*, 416 U.S. 470, 491-92 (1974) (policy of patent law is to encourage disclosure).

published prior to that date, the work was to remain in copyright for 25 additional years. The 94th Congress thus extended copyright protection for works created by authors "dead for many years, or even centuries." M. Nimmer & D. Nimmer, Nimmer on Copyright, § 5.04.

2. The First Congress clearly understood that its power under the Copyright Clause extended beyond providing incentives for the creation of new work; later Congresses have followed suit.

The Congress that enacted the first Copyright Act in 1790 established a term of federal statutory copyright protection for works to be published in the future—*i.e.*, after enactment of the 1790 Act. In doing so, Congress provided incentives for authors to create new works. But the 1790 Act also afforded federal statutory protection to works already in existence.[29] The First Congress thus could not possibly have believed that its power under the Copyright Clause was, as petitioners contend, artificially and absolutely limited to enactments that would provide incentives for the creation of new works.[30] As the court of appeals correctly observed, "the First Congress was clearly secure in its power under the

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[29] The 1790 Act afforded authors protection for "any map, chart, book or books, already printed within the United States," as well as those "already made and composed, but not printed or published, and that shall thereafter be made and composed." Act of May 31, 1790, § 1.

[30] Congress took the same action in 1976 when it converted existing state common-law rights into federal statutory ones. As it had in 1790, Congress in 1976 gave federal protection to works that had already been produced. It could not have done so if it believed that its only authority was to incentivize new works. Nor was Congress in 1790 or 1976 required to protect works already in existence in order to avoid unjustifiable destruction of existing rights under state law. If it truly believed—as petitioners contend—that it had no constitutional power to confer rights on works already in existence, it could simply have let the States continue to protect those works.

Copyright Clause *to extend the terms of subsisting copyrights* beyond those granted by the States."[31] And, as this Court noted well over a century ago:

> "[t]he construction placed on the constitution by the first [copyright] act of 1790 ... by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is entitled to very great weight."[32]

Furthermore, every time a subsequent Congress has increased the term of copyright protection it has increased the term of protection for subsisting works, as well as for works yet to be created. Congress took such action in 1831, 1909, 1976 and 1998. This consistent understanding of Congress's copyright power to provide additional protection for existing works has remained legally unchallenged until the instant litigation.[33] Such unchallenged congressional action over the length of our Nation's history is entitled to great weight: "[W]hen it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive." *Burrow-Giles*, 111 U.S. at 57.

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[31] 239 F.3d at 379 (emphasis added).

[32] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1883). Seventeen members of the First Congress had been delegates at the Constitutional Convention. See *Lynch v. Donnelly*, 465 U.S. 668, 674 (1983).

[33] Similarly, each of the interim extensions that preceded the enactment of the Copyright Revision Act of 1976 extended the renewal *term of subsisting copyrights* that, but for those extensions, would have expired while Congress considered adoption of that omnibus new law. M. Nimmer and D. Nimmer, Nimmer on Copyright, § 9.11[A]. Once again, Congress lacked this power if petitioners are correct.

3. Throughout History, Congress Has Frequently Enacted Copyright Laws That Cannot Be Explained As Designed Only To Provide Incentives For The Creation Of New Works.

As was true in 1790, and in all legislation regarding copyright terms since that time, Congress has repeatedly used its Article I power to enact provisions *that did not encourage the creation of new works.*

(a) Applying New Rights To Existing Works

When Congress has conferred new exclusive rights on copyright owners it has ordinarily made these rights available, not only to the authors of works to be created after enactment of the new law, but also to the proprietors of existing works. For example, when Congress enacted the Visual Artists Rights Act of 1990,[34] it expressly made the new statutory rights of integrity and paternity applicable to works created prior to the effective date of the Act.[35] Similarly, when Congress in 1976 expanded the rights of copyright proprietors to include the exclusive right to publicly display certain works, it made that new right applicable to both existing and future works.[36] And while

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[34] Pub. L. No. 101-650, 104 Stat. 5089 (1990).

[35] 17 U.S.C. § 106A(d)(2) (providing rights of paternity and integrity if author held title as of effective date). *See also Martin v. City of Indianapolis*, 982 F. Supp. 625, 638 (S.D. Ind. 1997) (Work created in 1987 deemed within ambit of Act); Edward Samuels, The Public Domain in Copyright Law, 41 J. Copyright Soc'y U.S.A. 137, 172-73 (1993) (discussing the manner in which Congress has over the entire history of the copyright laws, expanded rights in existing works).

[36] 17 U.S.C. § 301(a). Under this provision, all of the exclusive rights set forth in § 106 apply to works of authorship created before or after the effective date of the Act. *See also* Digital Performance Right in

the subject matter of copyright was extended by Congress to include musical compositions in 1831, it was not until 1897 that the law was amended to provide copyright owners with the exclusive right to publicly perform musical works.[37] It has always been understood that this new public performance right applied to works existing at the time of the 1897 amendments, as well as to works produced after 1897.

Other examples abound of adding new rights to existing copyrights. For instance, when Congress increased the penalties for civil and criminal copyright infringement, it applied the new increased penalties not only to infringement of future works, but also to works already in existence on the effective date of the increases. *See* the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774. Congress has taken similar "retroactive" action when it has enacted laws in response to harmful marketplace practices made possible by new technologies. For instance, both the Record Rental Amendment Act of 1984[38] and the Computer Software Rental Act of 1990[39] prohibited unauthorized rental practices that displace the sales of copyrighted works. These laws applied to music and software created and copyrighted prior to their dates of enactment, as well as to works created after those dates.[40] And, when Congress enacted the comprehensive 1976 revision of the Copyright Act, as a

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Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (granting to existing copyright owners the new right to publicly perform sound recordings by means of digital transmission).

[37] *See* Act of Jan. 6, 1897, 29 Stat. 481.

[38] *See* Pub. L. No. 98-450, 98 Stat. 1727 (1984); *see also* S. Rep. No. 98-162 at 2 (1984).

[39] Pub. L. No. 101-650, 104 Stat. 5089 (1990).

[40] In order to avoid penalizing reliance on the fact that the law previously did not prohibit these rental practices, both laws did not apply to copies acquired prior to the date of enactment and in possession of the renter as of that date.

general matter it applied the Act's rights and protections both to pre-existing and future works.[41] Congress could not have taken any of these actions if, as petitioners contend, it may not use the copyright power to extend the protection of existing copyrights.

(b) Other Examples

The foregoing examples demonstrate how Congress has consistently promoted progress by applying new rights and protections to existing works—something Congress could not do if petitioners' arguments were to be taken seriously. Congress has also enacted a host of other laws that cannot possibly be explained as inducing the creation of new works even in their wholly *prospective* application. Thus, Congress has passed laws to exempt from the exclusive rights of copyright owners activities such as the public performance or display of works during certain face-to-face teaching activity (§110(1)), performances and display during the course of religious services (§ 110(3)), the playing of radio and television broadcasts to customers by certain commercial establishments (§110(5)), and the performance of nondramatic literary or musical works by nonprofit fraternal and veterans' organizations (§110(10)). Enactment of such exemptions cannot possibly induce the creation of new works.

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[41] To take another example, the cable television compulsory license contained in the 1976 Act, 17 U.S.C. § 111, for the first time required cable operators to pay for the retransmissions of existing and future copyrighted works. As its legislative history makes clear, that provision was designed, in part, to facilitate dissemination of broadcast programming on a national basis. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710 (1984) (noting that in enacting the compulsory license, Congress clearly sought to further copyright clause goals by allowing the public to benefit from wider dissemination).

Also completely unrelated to creating incentives for the protection of new works is the Copyright Renewal Act of 1992,[42] which eliminated the need for copyright owners of works then in their initial term of copyright to take any action to renew their copyrights in order to obtain the 28-year statutory renewal term. Congress's actions had nothing to do with stimulating the creation of new works; it sought to address longstanding concerns that the renewal process had functioned as a trap for the unwary, and removed this trap by automatically granting the renewal term to existing works.[43] The deposit and registration provisions of the copyright law also promote the progress of arts and sciences by enriching the collections of the Library of Congress, and facilitating business transactions between copyright owners and potential licensees.[44]

B. Freed Of Petitioners' Crabbed Interpretation Of Congress's Power, The CTEA Easily Passes Constitutional Muster

The foregoing discussion illustrates the broad variety of ways in which Congress has used its copyright power for purposes other than stimulating the production of new works. It has protected existing copyrights against new means of infringement, expanded the exclusive rights of the proprietors of existing copyrights, increased penalties for the

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[42] Pub. L. No. 102-307, 106 Stat. 274 (1992).

[43] *See also* 17 U.S.C. § 202 (overturning series of state court decisions holding that absent an agreement to the contrary, authors or artists who sold a manuscript or work of art transferred the copyright as well as physical object); H.R. Rep. No. 94-1476, at 124 (1976) (explaining the rationale for the provision).

[44] *See* 17 U.S.C. §§ 701 *et. seq.* (describing operation of the Copyright Office), 407-412. In upholding the deposit requirement, one court has found it within Congress's power because it "sustains a national library for the public use." *Ladd v. Law & Technology Press*, 762 F.2d 809, 812 (9th Cir. 1985).

infringement of existing copyrights, conferred copyright on pre-existing works, increased the term of existing copyrights, and removed traps through which proprietors of existing works might lose rights. Congress has also acted to enrich the collections of our national library, to provide comprehensive copyright-related records, to harmonize our laws with those of other nations, and to bring our laws into conformity with international norms.[45] If petitioners' artificially narrow interpretation of Congress's power were to be adopted, all of these laws would be unconstitutional, for none of them can be explained as efforts to stimulate new creation. Congress's ability to enact copyright legislation in the future would also be greatly compromised, rendering Congress incapable of adequately fulfilling its constitutional responsibility to promote the progress of art, films, literature and music.

Suppose, for example, a new form of piracy arose that current copyright law did not adequately address. Petitioners would permit Congress to amend the law to prohibit this new form of piracy for works created *after* the amendment is

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[45] *See* Berne Implementation Convention Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. On several occasions, Congress has noted its concern that domestic copyright terms were less generous than those in other nations. When it passed the 1831 Act, Congress announced that one of its key objectives was "to enlarge the period for the enjoyment of copy-right, and thereby place authors in this country more nearly upon equality with authors in other countries." 7 Reg. Deb. 21, Cong. 2d Sess. App. CXIX (Dec. 17, 1830). Similarly, the legislative history of the 1976 Act reveals that, in increasing copyright terms, Congress was motivated in part by an interest in conforming U.S. terms to those in foreign nations. *See* H.R. Rep. No. 94-1476, at 134-136 (1976). ("The arguments as to the benefits of uniformity with foreign laws, and the advantages of international comity that would result from adoption of a life-plus-50 term, are also highly significant"). *See also* Supplemental Report of the Register of Copyright on the General Revision of U.S. Copyright Law, 87-88 (1965) ("[I]t is ... increasingly important to have the duration of U.S. copyrights conform to that prevalent abroad.").

enacted, but they deem it unconstitutional for Congress to protect *existing* works from the new brand of piracy, for such an amendment could do nothing to stimulate the creation of existing works.[46] Nor, if copyright infringement became a more serious problem, could Congress increase the criminal penalties for infringements of existing works, or the level of statutory damages, for again those increases could not possibly stimulate création of the works they would protect. Such results would not only be unfortunate, they would be patently absurd.

This Court should, instead, recognize Congress's authority to select means, in its rational judgment, best further the numerous goals of the Copyright Clause. Once freed of the illogical and artificial limitation petitioners would fasten on Congress's power, it is clear that application of the CTEA's new term of copyright to existing, as well as future, works was completely appropriate. As set forth in the CTEA's legislative history, Congress had ample reasons for following historical practice and applying the CTEA's new term of copyright to existing works. These included creating incentives to preserve and restore older works, helping to harmonize U.S. copyright laws with the laws of other nations, adequately rewarding authors and protecting their heirs in view of increased life expectancies, and responding to new technologies that increase opportunities for proprietors of existing copyright to disseminate their works.[47]

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[46] Nor would it be part of the "bargains" struck with the authors of existing works at the time of their creation. *See* Pet. Br. 23.

[47] The rationality of Congress's actions with respect to the CTEA is also reflected in the manner in which it conducted its legislative inquiry. It utilized its fact-finding capabilities by holding balanced hearings that evoked both strong support for and opposition to the term-extension proposal. The Senate Judiciary Committee produced a thorough and balanced Committee Report. Moreover, during the course of the legislative process that covered two Congresses, changes were made to

Application of the CTEA's new copyright term to existing works adheres to a common-sense tradition that dates back to the very first federal copyright law in 1790. The congressional action challenged in this case was thus neither unprecedented nor aberrational—as petitioners contend. It *would* have been aberrational had Congress decided *not* to extend the CTEA's new copyright term to existing copyrights. Congress had never before drawn an arbitrary line that would leave authors of older works with less protection that authors of future works. The Constitution does not require it to do so now.[48]

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the proposal to accommodate concerns raised about the breadth of the proposed term extension. For example, the CTEA includes a provision, 17 U.S.C. § 108(h), that provides an exemption from copyright infringement during the extended term for qualified libraries, archives and nonprofit educational institutions engaged in activities in the public interest.

[48] Congress is surely entitled to common-sense discretion to decide to make the same set of rules applicable to all copyright proprietors and infringers. *Cf.* 7 Reg. Deb. 424 (statement of Mr. Huntington) (noting that 'justice, policy and equity alike' forbade distinction between existing and pre-existing works) (Jan. 7, 1831). To do otherwise would, in fact, lead to a crazy-quilt of time-specific copyright rules. Under petitioners' position, copyright owners could be accorded only those rights that were part of the copyright law at the time of the creation of each particular work. In judging infringement claims and actions, courts and litigants would have to determine exactly when works were originally fixed in tangible form so as to give the copyright proprietor only those precise rights that existed *at that time*, not protections that might have been added at a later time. It is one thing for Congress to decide for good reason in particular cases not to apply new rights to existing works. It is quite another for this Court to lay down a constitutional rule that would deprive Congress of any ability to apply the same set of rules to all copyrighted materials.

III. APPLICATION OF THE CTEA'S COPYRIGHT EXTENSION TO EXISTING COPYRIGHTS DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioners base their First Amendment challenge to the application of the CTEA to existing copyrights on their alleged constitutional right to express themselves by mechanically reproducing and distributing the copyrighted works of others without permission. It is very doubtful, however, whether appropriating another's copyrighted work without permission—as opposed to copying that may be necessary for the purposes of comment or criticism—is the copyists "speech," for purposes of the First Amendment.[49] In all events, even if mechanical copying of another's copyrighted work without permission *is* protectible speech, application of the CTEA's extension of the term of copyright to existing works easily passes the intermediate-scrutiny test that petitioners invoke.

[49] In rejecting petitioners' First Amendment claim, the court of appeals may have erred when it stated that "copyrights are categorically immune from challenges under the First Amendment." *Eldred*, 239 F.3d at 377. One can imagine a copyright law—such as a law that would provide copyright on the basis of the political viewpoint of a work—that would violate the First Amendment. *See United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152, 1164-65 (D.C. Cir. 1987) (holding that Congress cannot validly enact a private copyright statute to ensure that Christian Scientists enjoy doctrinal purity). However, a content-neutral copyright law that is a valid exercise of Congress's copyright power, that does not purport to protect ideas, but only the particular expression of the author, and that leaves room for others to express themselves without unfairly appropriating an author's work, may well be immune from a First Amendment challenge.

A. Mechanical Copying of Another's Copyrighted Work Without Permission Is Not Free Expression For Purposes of the First Amendment

Petitioners assert that mechanical copying of the work of others and distributing it without their permission constitutes free expression for purposes of the First Amendment: "By barring the unauthorized use or dissemination of copyrighted works, copyright law regulates speech." Pet. Br. 37.[50] That is an extremely dubious proposition. The First Amendment is designed to enable people to publish *their own* expression, not to appropriate and distribute someone else's expression without permission. No expressive conduct is involved in running a photocopier or video tape recorder or in posting another's book on the Internet without the author's permission and against the author's wishes.

Petitioners' unusual claim that intentional copyright infringement constitutes First Amendment activity is not supported by any citation of authority. However, at least two cases in the courts of appeals flatly reject the contention. In *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir 1989), petitioner cable television companies were "in the position of claiming that they have a first amendment right to express themselves using the copyrighted material of others." *Id.* at 1190. The court of appeals held that they did not: "[T]he petitioners desire to make commercial use of the copyrighted works of others. There is no first amendment right to do so." *Id.* at 1191. In reaching this conclusion, the court relied on this Court's decision in *Harper & Row v. Nation Enterprises*,

[50] We join with *amicus* Professor Samuels in questioning petitioners' related contention that the Constitution on its own face creates a "public domain" where one has a constitutional right to appropriate the works of others without their permission. *See* Br. of Prof. Samuels as *Amicus Curiae* at 22-24.

471 U.S. 539 (1985), where the Court considered whether a magazine's unauthorized reproduction of portions of President Ford's memoirs was a violation of the Copyright Act. The court of appeals noted that, in upholding the application of the Act, the Court did not apply First Amendment scrutiny, but instead based its decision entirely on whether the magazine's publication constituted "fair use" under the statute (a claim which the Court rejected). *See also Author's League of America v. Oman*, 790 F.2d 220, 223 (2nd Cir. 1986) ("the cases establish that there is a constitutional right to freely circulate one's ideas .... They do not, however, create any right to distribute and receive material that bears the protection of the Copyright Act.").

The Copyright Act appears not to regulate speech because it does not impose liability based on the content of the defendant's *own* expression. Independent creation is a complete defense to infringement, and liability only flows based on those portions of a work that are copied from another. To the extent that any petitioner in this case claims an interest in publishing *their own* expression, petitioners fail to explain how the idea/expression dichotomy and the Copyright Act's fair use doctrine fail to protect that freedom.[51]

[51] Petitioners' contention that mechanical copying is First Amendment activity would, if accepted, raise doubts, not only about the Copyright Act, but also other federal statutes that prohibit unauthorized copying, such as 18 U.S.C. § 1832(a)(2) ("Whoever, with intent to convert a trade secret, copies, duplicates ... or conveys such information") and 18 U.S.C. § 1030 (prohibiting copying of information from a protected computer), as well as numerous applications of the Lanham Act, trade secret law and common law unfair competition and misappropriation doctrines.

B. Application of the CTEA's Copyright Term to Existing Copyrights Satisfies Intermediate Scrutiny

Amici believe that petitioners have not asserted any cognizable First Amendment right, and that the Court's inquiry should end there. Assuming *arguendo* that mechanical reproduction of another's copyrighted material without permission qualifies as protectible free expression, application of the CTEA's extended term of copyright to existing works easily satisfies intermediate scrutiny.[52] Petitioners' argument to the contrary is based entirely on their erroneous assertion that the only legitimate government interest that can validly justify a federal copyright statute is to encourage the production of new works. *See* Pet. Br. 40.

As we have shown in the prior section of this brief, however, Congress's application of the CTEA's new term of copyright to existing copyrighted works was a *valid* and traditional exercise of the copyright power, supported by Congress's desire to promote progress in literature, art and music by encouraging distribution and preservation of existing works, enhancing international harmonization, and taking account of increased life expectancies. . Congress's enactment of a valid copyright statute, pursuant to its express constitutional authority to enact copyright legislation, reflects an important governmental interest satisfying intermediate scrutiny. At the same time, the presence of a broad, flexible fair use provision and other exemptions and limitations in that statute satisfies the intermediate scrutiny requirement of narrow tailoring.[53]

[52] There appears to be a consensus among those urging application of the First Amendment to copyright infringement that intermediate scrutiny would be the appropriate constitutional standard.

[53] *See Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 73 (2d Cir. 1999) (noting that First Amendment concerns are

CONCLUSION

The complaint in this case does not present a justiciable controversy. If the Court reaches the merits of the petition, the decision of the court of appeals should be affirmed.

Respectfully Submitted,

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protected by the fair use doctrine); *New Era Pubs. v. Henry Holt & Co.*, 813 F.2d 576, 584 (2d Cir. 1989) ("The fair use doctrine encompasses all claims of first amendment in the copyright field."); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) (same); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978) (same); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977).